92-1384

No.

(1)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1992

BARCLAYS BANK PLC
Petitioner,

vs.

FRANCHISE TAX BOARD,
An Agency of the State of California
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

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39 pp

QUESTIONS PRESENTED

1. Whether California's application of worldwide combined reporting to determine the taxable income of domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries, is unconstitutional under the foreign Commerce Clause.

2. Whether California's application of worldwide combined reporting to determine the taxable income of domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries, is unconstitutional under the Commerce Clause where such application imposes discriminatory compliance burdens on such entities.

3. Whether California's application of worldwide combined reporting to determine the taxable income of domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries, intrudes into an inherently federal area and is preempted by the United States Constitution.

4. Whether California's system for compliance with worldwide combined reporting violates the Due Process Clause of the United States Constitution where compliance is not possible without undue cost and the system, to function, depends on discretionary relief provisions without constitutionally sufficient standards to guide application and prevent arbitrary enforcement.

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PETITION FOR WRIT OF CERTIORARI

This petition for a writ of certiorari seeks this Court's review of the judgment of the California Court of Appeal, Third Appellate District, after remand from the California Supreme Court, on a nationally and internationally important matter relating to the limitations under the United States Constitution on the power of the states to apportion and tax the income of domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries, under worldwide combined reporting.

OPINIONS BELOW

The Statement of Decision of the California Superior Court (Appendix A)[1] is an unreported decision. The first opinion of the Court of Appeal of the State of California in and for the Third Appellate District (App. B) was reported at 232 Cal. App. 3d 1187 (1990) and again at 3 Cal. App. 4th 1034 (1990) to permit tracking of the case pending review by the California Supreme Court.[2] The opinion of the Supreme Court of California (App. C) is reported at 2 Cal. 4th 708 (1992). The opinion of the Court of Appeal on remand, as modified, is reported at 14 Cal. Rptr. 2d 537 (1992)[3] (App. D). The California Supreme Court denied review on February 18, 1993 without opinion (App. E).

LIST OF PARTIES

The parties are as stated in the caption. In the courts below, the plaintiffs and respondents were Barclays Bank International Limited, a United Kingdom corporation, and Barclays Bank of California, a California corporation which was wholly owned by Barclays Bank International Limited. As appears in the Rule 29.1 Statement, Barclays Bank International Limited was merged with Barclays Bank PLC and Barcal was sold to Wells Fargo & Company with the present tax matters and claims for refund being assumed by Barclays Bank PLC.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner states that during the income year 1977, Barclays Bank Interna-

[1] All references to the appendices in this petition are denominated "App." followed by the letter to each item and, where necessary, a page reference.

[2] Pursuant to the California Rules of Court, Rule 976(d), the opinion of the Court of Appeal was vacated by the Supreme Court of California's grant of review on February 28, 1991.

[3] The official reporter, 10 Cal. App. 4th 1742, at present has reported only the unmodified opinion.

tional Limited ("BBI"), a United Kingdom corporation, was a wholly owned subsidiary of Barclays Bank Limited ("BBL"), also a United Kingdom corporation. During income year 1977, Barclays Bank of California ("Barcal"), a domestic corporation, was a wholly owned subsidiary of BBI. On February 15, 1982, BBL reregistered as a public company under the provisions of the Companies Act 1980 of the United Kingdom and changed its name to Barclays Bank PLC. On January 1, 1985, under the terms of the Barclays Bank Act 1984 of the United Kingdom, the United Kingdom banking business of Barclays Bank PLC was merged with the international and other overseas banking operations of BBI under the name Barclays Bank PLC. The ultimate parent of Barclays Bank PLC is now Barclays PLC, listed on the London Stock Exchange. On February 20, 1988, Barclays Bank PLC sold the stock of Barcal to Wells Fargo & Company. Under the terms of the agreement, Barclays Bank PLC assumed any tax liability at issue herein and retained all claims for refund. Barclays Bank PLC's non-wholly owned subsidiaries are listed in Appendix G to this petition.

JURISDICTION

The California Supreme Court's May 11, 1992 opinion (App. C) decided the first question presented in this petition but remanded the cause to the California Court of Appeal for consideration of the remaining federal issues in light of the California Supreme Court's decision. The judgment of the California Court of Appeal, Third Appellate District, after remand from the California Supreme Court, was rendered on November 20, 1992. The California Court of Appeal denied a timely filed petition for rehearing on December 18, 1992. On February 18, 1993, the Supreme Court of California denied a timely filed petition for review. The now final judgment of the Court of Appeal carries with it all federal issues in this cause. *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *Louisiana Navigation Co. v. Oyster Comm'n*, 260 U.S. 99, 102 (1912). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).[4]

[4] *See also* footnote 13, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the following constitutional and statutory provisions are reproduced in Appendix F: Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause); Article VI, Clause 2 of the United States Constitution (the Supremacy Clause); Amendment XIV, Section 1 of the United States Constitution (the Due Process Clause); and California Revenue & Taxation Code Sections 25101 and 25137.

STATEMENT

The issues raised by this case — issues specifically reserved by this Court in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983) — concern the powers of a state to tax a domestic corporation with a foreign parent, or a foreign corporation with either a foreign parent or foreign subsidiaries, under worldwide combined reporting. The precise question presented is whether California's application of worldwide combined reporting to Barcal, a domestic corporation with a foreign parent, and to BBI, a foreign corporation with a foreign parent and foreign subsidiaries, is unconstitutional.

California's action already has caused serious national and international repercussions. The United States appeared as amicus curiae in the courts below to assert that this action is "patently unconstitutional."[5]

1. THE BUSINESS OF THE BARCLAYS GROUP.

In 1977 Barcal and BBI, the California taxpayers, were part of the Barclays Group, a United Kingdom banking group of over 220 corporations doing business in some 60 nations.[6] The ultimate

[5]The United States appeared as amicus curiae in the California Superior Court, Court of Appeal and Supreme Court. The brief filed in the California Supreme Court is reproduced at App. H.

[6]BBI and BBL agreed for purposes of the litigation that they were members of a worldwide unitary business for 1977. App. A at 42.

parent, BBL (now Barclays Bank PLC), was one of the United Kingdom clearing banks. Only two of such subsidiaries (Barcal and Barclays Bank of New York) were incorporated in the United States and only one other subsidiary, BBI, also did business in the United States. The Barclays Group conducted over ninety-eight percent (98%) of its business outside the United States. The Barclays Group was and is involved in all phases of international banking, including retail, merchant, and commercial banking, leasing and consumer credit and finance.

BBI was a corporation organized under the laws of England and was domiciled and doing business in the United Kingdom. BBI also did business in over 33 nations and territories outside the United Kingdom including the United States. BBI operated a banking agency in California. BBI itself owned, directly or indirectly, more than fifty percent (50%) of over 70 subsidiary corporations which operated in approximately 34 nations and territories outside the United Kingdom. Barcal, a California banking corporation, was a wholly owned subsidiary of BBI.

2. THE INTERNATIONAL STANDARD FOR DIVISION OF INCOME AMONG NATIONS FOR TAX PURPOSES.

The United States, the United Kingdom and other nations of the world divide the income of multinational enterprises among nations for tax purposes by the arm's length separate accounting method ("the arm's length method"). The arm's length method treats each corporation as "an independent entity dealing at arm's length with its affiliated corporations, and subject to taxation only by the jurisdictions in which it operates and only for the income it realizes on its own books." *Container*, 463 U.S. at 185. Where a corporation crosses national boundaries, the host (non-domiciliary) country taxes that corporation only on the profits earned in the host country and as if those profits were earned by a separate enterprise.

The United States has been a leader in establishing the arm's length method as the international standard. Both the United States and its trading partners use this standard in all bilateral tax treaties and in their internal tax laws. The standard is "universally

used and favored" by the nations of the world both "as an ideal and as a working methodology." App. A at 20-21. The arm's length standard is the international practice. *Container*, 463 U.S. at 184.

California uses a different and incompatible method to divide the income of a multinational enterprise for tax purposes — worldwide combined reporting. This method aggregates the income of all entities which form a part of the unitary business wherever they do business and determines California's share of this aggregate income by a formula, generally the average of the property, payroll and sales within and without California.

The income allocated to a tax jurisdiction under the arm's length method can and does differ substantially from the income apportioned to that jurisdiction under worldwide combined reporting. There is no way to reconcile these differences.

California worldwide combined reporting requires worldwide tax information for all members of the unitary group, not just for taxpayers. Foreign multinational enterprises incur greater costs to comply with California's reporting requirements than do domestic multinational enterprises and those domestic enterprises doing business only in the United States. While domestic enterprises may keep most of their records in accord with United States financial and tax accounting principles, foreign enterprises generally have no reason to collect worldwide information in that form except to comply with the California tax system. The international standard does not require the reporting of such information. Such foreign enterprises incur significant costs in obtaining the necessary information and transforming it into California tax information. App. D at 9-10.

Only a handful of states of the United States have ever used worldwide combined reporting. No *nation* uses worldwide combined reporting.

3. THE IMPACT OF CALIFORNIA'S APPLICATION OF WORLDWIDE COMBINED REPORTING TO FOREIGN OWNED MULTINATIONALS.

In the early 1970's respondent first extended worldwide combined reporting to foreign owned multinationals. The extension of this conflicting method into the international arena brought immediate complaints from both foreign business and foreign governments. Foreign governments bombarded the United States government with formal and informal diplomatic protests about worldwide combined reporting as applied to foreign multinationals. These included diplomatic notes from virtually every developed country in the world, protestations from heads of nations including Prime Minister Thatcher of the United Kingdom, Prime Minister Nakasone of Japan, and Prime Minister Trudeau of Canada directly to the President, delay in treaty negotiations by the Netherlands and West Germany, and strong representations from the French, Danish, Italian and German governments. The Canadian and French tax treaty negotiators insisted on an exchange of notes which called attention to their concerns and which obligated the United States to reopen discussions with each country if an acceptable solution could be devised. Foreign governments even attemped unprecedented direct persuasion at the state level.

Finally, in 1985, after years of diplomatic effort, the United Kingdom enacted retaliatory legislation which would deny certain treaty benefits to United States corporations operating in unitary states. The legislation had a chilling effect on the willingness of United Kingdom subsidiaries of such corporations to repatriate dividends.

The Federal Executive has steadfastly promoted and adhered to the use of arm's length separate entity accounting for the division of international income and has opposed the use of worldwide combined reporting through all administrations confronted with this issue. Initially, the United States added Article 9(4) to the tax treaty then being negotiated with the United

Kingdom.[7] Article 9(4) would have required states to use the arm's length method when taxing affiliates of United Kingdom companies. Although a reservation which would remove Article 9(4) from the Treaty was defeated in both the Senate Foreign Relations Committee and the full Senate, the majority vote of the Senate for the Treaty including Article 9(4) fell five votes short of the two-thirds majority necessary for ratification. The Treaty was resurrected after parliamentary maneuvering in which the reservation was added without a separate vote, and the Treaty, with the reservation, was ratified by the Senate.[8] The United Kingdom House of Commons ratified the Treaty only after strong assurances from the United States that the matter of worldwide combined reporting would be resolved. The United States has continued with efforts at resolution. The appearance of the United States as amicus curiae in all three California courts below in support of BBI and Barcal is a part of such efforts.

Congress has enacted no legislation dealing with this issue. Bills concerning unitary taxation have been introduced, but there has never been a vote in a congressional committee or in either house of Congress on such a bill. None of the bills has dealt solely with worldwide combined reporting as applied to foreign multinational enterprises.

4. THE ASSESSMENTS.

Respondent California Franchise Tax Board audited the California tax returns of BBI and Barcal for 1977 and determined that BBI and Barcal were part of a worldwide unitary business conducted by the members of the Barclays Group. Respondent assessed additional taxes of $4,076 to BBI and $254,699 to Barcal, subsequently reduced during the administrative process to $1,678 and $152,420, respectively. BBI and Barcal protested the tax on the basis, inter alia, that the correct method upon which to compute the tax was the arm's length method. App. A at 39-40.

[7]The United States/United Kingdom Income Tax Convention is hereafter referred to as the US/UK Treaty or Treaty.

[8]The reservation was included in the Third Protocol to the Treaty which also contained other changes.

BBI and Barcal paid the additional assessed taxes and filed suit for refund, challenging the constitutionality of the application of worldwide combined reporting to foreign owned multinational groups.

5. THE PROCEEDINGS BELOW.

A. How the Federal Questions Were Raised and Passed On Below.

In their complaints and briefs in the California Superior Court, and in their briefs in the California Court of Appeal and in the California Supreme Court, BBI and Barcal contended that the foreign Commerce and Due Process Clauses of the United States Constitution precluded the application of worldwide combined reporting to taxpayers that are members of a foreign owned and controlled unitary group. These courts explicitly noted and ruled on these constitutional contentions.

B. The Decisions Below.

(i) California Superior Court and Court of Appeal (First Opinion).

The California Superior Court found, and the California Court of Appeal affirmed, on the basis of substantial evidence,[9] that respondent's application of worldwide combined reporting to foreign owned multinational groups violated the foreign Commerce Clause because it "impair[ed] federal uniformity in an area where federal uniformity is essential" and "prevent[ed] the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448, 451 (1979) (hereafter the "one voice" test).

Both courts rejected the contentions of respondent that five factors showed a congressional policy "to permit the states to tax

[9]Although there are some stipulations, App. A at 36 and 70, the case was tried on a contested record. The Statement of Decision of the Superior Court (App. A) explains the factual and legal basis for its decision as to each of the controverted issues at trial. Cal. Civ. Proc. Code § 632.

as they please" by "negative acquiescence" without congressional legislation.[10] In light of the distinctions between this case and *Container* and the radical differences between the arm's length international standard and worldwide combined reporting, both courts found that a direct adverse impact on foreign affairs from the use of worldwide combined reporting was "inevitable."[11]

The Court of Appeal also found a clear and thoroughly grounded policy of the Executive to require the use of the arm's length method to divide income of foreign multinational enterprises. The Court of Appeal further found that, in the face of congressional inertia and inaction and in an area where the Executive has traditionally been given great deference, this policy constituted a "clear federal directive."

Regarding the discrimination issue, the Superior Court found de facto discrimination amounting to economic protectionism where domestic competitive enterprises did not have the compliance burden which worldwide combined reporting placed on foreign based multinational taxpayers. App. A at 26. The Court of Appeal acknowledged this legal analysis was based on substantial evidence, and mentioned that foreign anger was even more understandable "in light of the critical role the United States has played in attempting to construct a coherent and nondiscriminatory tax policy for all nations" based on separate accounting. App. B. at 26.

The Superior Court also ruled that the due process clauses of the California and United States Constitutions were violated.

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[10]The factors were: no coverage of state taxes in United States treaties or the United States Model Income Tax Convention, except in nondiscrimination clauses; failure of the Senate to ratify the US/UK Tax Treaty with Article 9(4); failure of Congress to enact legislation restricting state taxes; reservations to the OECD and UN Model Income Tax Conventions; and no coverage of state taxes in treaties of friendship, commerce, and navigation.

[11]The Court of Appeal affirmed the holding of the Superior Court that, even with the "definite risk of, as well as actual double taxation" in this case, worldwide combined reporting in this context did not fail the first additional test of *Japan Line* (double taxation).

(ii) California Supreme Court.

In reversing the decision of the Court of Appeal, the California Supreme Court recognized that it was "presented with a question left open in *Container*, (*supra*, 463 U.S. at p. 189, fns. 26 & 32)," App. C at 3, but rejected analysis under the tests this Court set forth in *Container* and *Japan Line*. Rather, the California court declared that ***Wardair Canada v. Florida Dep't of Revenue***, 477 U.S. 1 (1986), had "reoriented" the dormant Commerce Clause and had reduced the scope for dormant Commerce Clause analysis so as to make such analysis "particularly inappropriate" in this case. App. C at 19. Instead, "*Wardair* supplants what the court has termed the 'quagmire' of dormant commerce clause analysis . . . with a heightened judicial attentiveness to expressions of congressional foreign commerce policy." App. C at 21. From this perspective, the court "abstracted" this Court's analysis of the "textual materials" in *Wardair* "into a kind of protocol for identifying those kinds of governmental silences that give rise to 'negative implications' supporting an inference of federal acquiescence in the state tax under challenge." App. C at 23.

The California court constructed its own test to determine whether a state tax violates the foreign Commerce Clause: whether in the absence of legislation, Congress' "inaction" constituted a "pattern of congressional action" which "evidences both an awareness of [the] issue and a refusal to adopt the remedy urged upon it." App. C at 38. The court took the same five items which the lower courts had rejected as evidences of congressional policy (*see* footnote 10, *supra*) and under its new test treated them as "those kinds of governmental silences . . . [implying] federal acquiescence in the state tax under challenge." App. C at 23. The court never addressed the fact that this Court had considered the most important of these factors in *Container* (the treaties, Article 9(4), no congressional legislation) and found neither explicit action nor congressional policy.

Because the "*Wardair* methodology interdict[ed] judicial resort to executive branch opinions as to the international commercial effect of a challenged state taxation practice . . . ." App. C at

21, the California court rejected the views of the United States,[12] appearing as amicus curiae, that California's use of worldwide combined reporting interfered with the "Federal Executive's conduct of foreign affairs." App. C at 37 n.22.

Thus, the court did not consider the findings below of burden on commerce or the foreign policy implications in the application of worldwide combined reporting, including retaliation and threats of retaliation, but concluded that it was "adher[ing]" to this Court's "central meaning" in *Wardair* in holding that Congress' "refusal to legislate restrictions on state use of worldwide [combined reporting]" was not silence which triggered dormant Commerce Clause analysis. App. C at 38.

Noting that the Court of Appeal did not appear to have passed directly on the discriminatory effect of compliance burdens on the Commerce Clause and had explicitly declined to decide the due process issue, the court remanded that issue to the Court of Appeal for further proceedings.[13]

(iii) Court of Appeal (Second Opinion).

On remand the Court of Appeal agreed that foreign based corporate groups incurred greater and significant administrative costs to comply with the California system than did their domestic counterparts. However, the court concluded that the burdens were not constitutionally discriminatory because foreign and domestic corporations faced the same tax rate and had to furnish the same information.[14]

[12]The California court concluded that the "clear federal directive" test in *Container* was not part of the dormant Commerce Clause analysis, but served only to determine whether Congress had acted to preempt an otherwise valid state tax.

[13]While such remand was pending on these remaining federal issues, petitioner sought review by this Court of the federal issue decided by the California Supreme Court. 61 U.S.L.W. 3112 (Aug. 3, 1992) (92-212). Respondent opposed the petition chiefly on the ground that the decision of the California Supreme Court was not a final decision of the highest state court under 28 U.S.C. § 1257 because of the remand of the cause to the Court of Appeal for decision on the remaining federal issues. This Court denied the petition on October 5, 1992. ____ U.S. ____, 113 S. Ct. 202 (1992). The now final judgment of the Court of Appeal carries with it all federal questions in this cause, including those decided by the California Supreme Court. *Urie v. Thompson*, 337 U.S. at 172-73; *Louisiana Navigation*, 260 U.S. at 102.

The Court of Appeal further determined that, in the context of a non-arbitrary application, Regulation 25137-6 did not result in unreasonable, undue or arbitrary costs of compliance and that the Regulation could be construed to contain constitutionally adequate standards to guide application of respondent's discretion to grant relief from the mandatory provisions of the Regulation.

REASONS FOR TAKING THE CASE

This Court in *Container* specifically reserved the question which this case squarely presents: the "constitutionality of combined apportionment with respect to state taxation of domestic corporations with foreign parents or foreign corporations with either foreign parents or foreign subsidiaries." 463 U.S. at 189 n.26. Nevertheless, the California Supreme Court, perceiving a "diminution in the reach of dormant foreign commerce clause analysis," App. C at 4, held the very analysis used by this Court in *Container* inapplicable to resolve the question reserved. The California court fashioned a new test in Commerce Clause jurisprudence, permitting a court to disregard "sensitive matters of foreign relations and national sovereignty," *Japan Line*, 441 U.S. at 456, and to search instead for "those kinds of governmental silences that give rise to 'negative implications' supporting an inference of federal acquiescence in the state tax under challenge." App. C at 23. The California court's perception and new approach are inconsistent with holdings of this Court on the sweep and the application of the dormant foreign Commerce Clause. *See Japan Line*, 441 U.S. 434; *Container*, 463 U.S. 159; *Kraft Gen. Foods, Inc. v. Iowa Dep't of Rev. and Finance*, ____ U.S.____, 112 S. Ct. 2365 (1992). They are also irreconcilable with the decisions of this Court on the need for explicit congres-

[14]The court did not address the finding by the Superior Court that only a foreign multinational was put to the choice of foregoing tax benefits or spending inordinate sums to file properly. App. A at 28.

sional action to remove state laws which burden commerce from the reach of the Commerce Clause. *See Wyoming v. Oklahoma*, ____U.S.____, 112 S. Ct. 789 (1992); *Maine v. Taylor*, 477 U.S. 131 (1986); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).

The limitation on a state's right to burden commerce is an important and recurring issue before this Court and a number of cases and administrative proceedings in California are dependent on the outcome of this case. *See* App. I. The decisions below, if left undisturbed, will stimulate aggressive unconstitutional taxation not just by California but by other states.

The issues presented here are of paramount national importance. The application of this tax method to foreign owned multinational businesses has already led to enactment of retaliatory legislation by the United Kingdom, threats of retaliation by other nations, and strong and continuing protests by all of the major trading partners of the United States. In its appearance as amicus curiae in all three California courts below, the United States has attested that the use of worldwide combined reporting in these circumstances is "an egregious interference with the Federal Executive's conduct of foreign affairs and is . . . patently unconstitutional." *See* App. H at 25 n.13. The administrative burdens of worldwide combined reporting, arising because the system is incompatible with accepted international practice, exacerbate foreign objections and also raise serious questions of improper discrimination in favor of domestic commerce.

The decisions below erode United States foreign economic policy by spreading confusion as to how the policy is formulated, confusion as to who speaks for the United States, and even confusion as to what that policy actually is.

This Court's review of this case is necessary to resolve the conflicts and confusion which the decisions below have created.

1. CALIFORNIA WORLDWIDE COMBINED REPORTING IS UNCONSTITUTIONAL UNDER THE FOREIGN COMMERCE CLAUSE. THE DECISIONS BELOW REWRITE ESTABLISHED FOREIGN COMMERCE CLAUSE JURISPRUDENCE AND ARE INCONSISTENT AND INCOMPATIBLE WITH THIS COURT'S DECISIONS.

The oft-recurring question of whether state taxes may permissibly burden commerce[15] takes on a different dimension when the commerce is foreign.

This Court has recognized that "the constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded to interstate commerce." *Kraft*, 112 S. Ct. at 2370 (citing *Japan Line*, 441 U.S. at 445-46). Foreign commerce merits broader protection because "matters of concern to the entire Nation are implicated. [*Japan Line*, 441 U.S.] at 448-451." *Kraft*, 112 S. Ct. at 2370. Discriminatory treatment of foreign commerce carries with it "the potential for international retaliation" that will concern and "harm the Nation as a whole," not just the offending state.[16]

With these concerns in mind this Court twice reserved the issue of the constitutionality of this very taxing method in *Container*, 463 U.S. at 189 n.26 and 195 n.32, when applied to foreign owned taxpayers. This case squarely presents that reserved question. The California Supreme Court, however, perceived a "diminished reach" in foreign Commerce Clause analysis subsequent to *Container*. That court's perception rested solely on its reading of this Court's *Wardair* opinion as supplanting this Court's traditional analysis. The California court ignored not only the analyti-

[15] *See, e.g., Wyoming v. Oklahoma*, 112 S. Ct. 789; *Kraft*, 112 S. Ct. 2365; *Container*, 463 U.S. 159; *Japan Line*, 441 U.S. 434.

[16] The same policies underlie the import-export clause. *See Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) and *Japan Line*, 441 U.S. 434. The broader protection accorded to foreign commerce also requires stricter scrutiny in considering whether Congress has acted to permit such a burden. *See South-Central Timber*, 467 U.S. 82.

cal framework of *Container* and *Japan Line*, but also this Court's very specific requirements of affirmative permission by Congress for a state to burden commerce.

This Court has demonstrated in two decisions subsequent to both *Container* and *Wardair*, i.e., *Kraft* and *Wyoming v. Oklahoma*, that it has not abandoned either its great sensitivity in matters of foreign commerce or its requirement that Congress act explicitly to remove a state enactment from the reach of the dormant Commerce Clause. Thus the decision below remains inconsistent and incompatible with prior and subsequent decisions of this Court.

A. This Court Has Established Criteria for Determining the Constitutionality of State Taxes Under the Foreign Commerce Clause; the California Court Disregarded These Criteria.

This Court has formulated a four part test to determine if a state tax satisfies basic Commerce Clause requirements: (1) the tax must be applied to an activity with a substantial nexus with the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Recognizing and stressing the need for uniformity in dealing with other nations when foreign commerce is implicated, this Court in *Japan Line* added two additional tests to the basic four part test:

- whether the tax, notwithstanding apportionment, created a substantial risk of multiple taxation; and
- whether the tax impaired federal uniformity in an area where federal uniformity is essential and prevented the Nation from speaking with one voice when regulating foreign commerce.

Japan Line, 441 U.S. at 451. With respect to multiple taxation, this Court pointed out that "even a slight overlapping of tax — a problem that might be deemed *de minimis* in a domestic context — assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." *Japan Line*, 441 U.S. at 456. A tax could prevent the Nation from speaking with one voice and frustrate achievement of federal uniformity by leading to international disputes over reconciling apportionment formulae, by creating asymmetry in the international tax structure leading to retaliation which causes harm to the Nation as a whole, not just to the state, and by increasing the potential for varying degrees of multiple taxation should other states follow the taxing state. *Japan Line*, 441 U.S. at 450-51.

In *Container*, involving the same California taxation method at issue here but applied to a domestic owned multinational group, this Court reaffirmed the two additional *Japan Line* tests, but found constitutionally significant that double taxation was not an inevitable result of the California taxing scheme and that the tax fell not on foreign owned but on domestic owned corporations. Elaborating on the "one voice" inquiry, this Court stated that a state tax at variance with federal policy would fail the one voice standard if "it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive." *Container*, 463 U.S. at 194. The most obvious foreign policy implication of a state tax was the "threat it might pose of offending our foreign trading partners and leading them to retaliate against the Nation as a whole." *Id.* "In the absence of explicit action by Congress", *id.*, to determine when foreign nations would be offended and to decide how to balance the risk of retaliation against the sovereign right of the United States to let the states tax as they please, this Court developed "objective standards" reflecting general observations about the imperatives of international trade and foreign relations. When applied in the factual context of *Container*, these factors weighed against the conclusion that the California tax might justifiably lead to foreign retaliation: the tax did not create automatic asymmetry in international taxation; the tax fell not on a foreign entity but on a domestic corporation;[17] and, even if foreign nations had a legitimate interest in reducing tax burdens of domestic corporations, the amount of

[17]This Court also reserved the question of whether its analysis as to the importance of the incidence of the tax might be different if the taxpayer were a domestic subsidiary of a foreign corporation. *Container*, 463 U.S. at 195 n.32.

tax paid by the domestic taxpayer was more a function of the tax rate than the allocation method.[18]

1. Under This Court's Criteria, Worldwide Combined Reporting Applied to Foreign Owned Taxpayers Is Unconstitutional.

Tested by the standards of *Japan Line* and *Container*, worldwide combined reporting applied to members of a foreign owned multinational group, as here, is unconstitutional. Worldwide combined reporting clearly implicates foreign policy issues which must be left to the federal government and prevents the Nation from speaking with one voice.[19] This Court need not speculate as to foreign offense: in this case there is actual retaliation as well as threats of retaliation. There is automatic asymmetry in international taxation as United States corporations are not subjected to worldwide combined reporting by any nation. The California tax falls on a foreign corporation as well as on the domestic subsidiary of a foreign corporation. The amount of tax paid is a function of the allocation method, not the tax rate. Finally, the United States has appeared as amicus curiae in all three California courts in this case.

2. The Court Below Ignored the Criteria.

The California Supreme Court ignored this Court's dormant Commerce Clause analysis on the basis that *Wardair* had "supplanted" such analysis, when Congress had not acted, with a search for congressional policy evidenced by inaction. Thus, the court never determined whether worldwide combined reporting implicated foreign policy issues under the standards set forth in *Container* and *Japan Line*. The California Supreme Court further held that the "clear federal directive" prong of *Container* was not a dormant Commerce Clause test but applied only to invalidate otherwise valid state taxes. It thus avoided the question of whether worldwide combined reporting in these circumstances was fatally inconsistent with federal policy, the more relaxed "species of preemption" standard adopted by this Court in *Container*, 463 U.S. at 194. It also avoided any consideration of the role of the Executive in formulating federal policy on the ground that only Congress played any role in creating such policy.

[18]This Court also noted the absence of a brief by the Executive branch. Chief Justice Rehnquist notes in his dissent in *Kraft* that the domestic nature of the petitioner and the absence of a United States amicus brief were the distinctions between *Container* and *Japan Line*. *Kraft*, 112 S. Ct. at 2372.

[19]Petitioner contends that worldwide combined reporting applied to taxpayers which are members of a foreign owned multinational group also violates the first additional test, enhanced risk of or actual double taxation. Whether the *Container* requirement of "inevitability" would apply in the circumstances of a taxpayer which is a member of foreign owned multinational business has not been decided and should also be resolved by this Court.

This Court should affirm that dormant Commerce Clause analysis remains applicable and appropriate, decide the reserved question in *Container*, and give guidance on the scope and application of the "clear federal directive" test.

B. The Decision of the California Supreme Court Contradicts the Conclusions of This Court in *Container*.

This Court in *Container* held that failure of treaties to cover subnational taxes or to restrict states to the arm's length method, failure of the Senate to pass the US/UK Treaty with a provision which would have restricted state use of a non-arm's length method, and failure of Congress to enact legislation restricting state taxation did not constitute "specific indications of congressional intent." *Container*, 463 U.S. at 196. Nevertheless, the California court relied on these same items as evidences of congressional "acquiescence" amounting to ratification of the states' use of worldwide combined reporting. App. C at 34. If such items now evidence a congressional policy sufficient to remove this case from the dormant Commerce Clause, why did this Court bother with its analysis in *Container*, grounded as it is on "the absence of explicit action by Congress" and no "specific indications of congressional intent." *Container*, 463 U.S. at 194, 196. This Court should resolve this conflict.

C. The Decision Below Is Inconsistent with This Court's *Wardair* Decision.

This Court's *Wardair* decision is factually and legally inconsistent with the California court's use of that decision to overturn this Court's dormant Commerce Clause jurisprudence. *Wardair* concerned a state sales tax on a discrete transaction (purchase of fuel in Florida) occurring only within one national jurisdiction and including neither actual nor possible international multiple taxation. In *Wardair*, this Court strongly reaffirmed the policies of the dormant Commerce Clause including the greater need for uniformity in areas of foreign commerce, but determined that the federal policy urged by the petitioner, reciprocal tax exemptions for aircraft, did not exist. On the contrary, "in the context of this case," the evidence demonstrated that the federal government had "affirmatively acted, rather than remained silent, with respect to the power of the state to tax aviation fuel." *Wardair*, 477 U.S. at 9. Congressional action constituting law came from the Chicago Convention, a treaty entered into by the United States and 156 other nations, which by its terms precluded the imposition of local taxes on fuel in certain circumstances but did not prohibit the taxation of fuel in the circumstances before the Court. This text demonstrated:

> the international community's awareness of the problem of state and local taxation of international air travel, specifically aviation fuel, and represent[ed] a decision by the parties to that Convention to address the problem by curtailing and limiting only some of the localities' power to tax, while implicitly preserving other aspects of that authority.

Wardair, 477 U.S. at 10. Subsequent treaties, including the United States/Canadian Treaty, dealt only with national taxes, leading to the inference that Congress had "negatively acquiesced" in the Florida tax.[20] This Court explicitly said that it was not addressing — and the opinion should not be understood as addressing — whether, in the absence of these international

[20]The Canadian provinces also were applying a tax similar to that imposed by Florida, an indication that there was no uniform policy against such taxes and thus no international consensus.

agreements, the foreign Commerce Clause would invalidate Florida's tax. *Wardair*, 477 U.S. at 13. Thus, this Court proceeded in *Wardair* against an extensive background of enacted congressional legislation — the Federal Aviation Act domestically and the Chicago Convention internationally — both of which dealt with state sales taxes and the latter with state sales taxes on aviation fuel.

In contrast, this case involves worldwide activities in a myriad of nations, conflict with the established international standard for the division of income among nations, and actual and enhanced risk of multiple taxation. In this case there is no seminal statute or other enactment which addresses the specific problem and certainly no international agreement on the California court's solution, *i.e.* "let the states tax as they please."[21] On the contrary, there is vehement and unrelenting international opposition, an opposition joined by the United States Executive. The California court even creates its own test for its "reoriented analysis", congressional "refusal" to act while "aware" of the problem, a test which does not appear in *Wardair* — or for that matter in any of this Court's decisions. This Court's *Kraft* and *Wyoming v. Oklahoma* decisions, subsequent to *Wardair*, establish that *Wardair* represents neither the change in course nor the retrenchment claimed by the California court.

D. The Ruling of the California Court Is Irreconcilable with This Court's Standards for Determining Whether Congress Has Acted To Permit a State To Burden Commerce.

This Court has consistently held that, to exempt a state tax or other regulation which burdens commerce from scrutiny, "Con-

[21]Other than Article 9(4) of the US/UK Treaty, none of the items which the court below used as evidence of congressional awareness and refusal to act even deals with worldwide combined reporting applied to foreign multinational groups. Under the California court's approach, the stalemate created by the minority in the Senate over Article 9(4) becomes an explicit "refusal" to act evidencing Congress' exercise of its "power . . . [t]o regulate Commerce with foreign Nations . . . ." U.S. Const. art. I, § 8, cl. 3.

gress must manifest its unambiguous intent before a federal statute will be read to permit or approve of such a violation of the Commerce Clause . . . ." *Wyoming v. Oklahoma*, 112 S. Ct. at 802. *See also Maine v. Taylor*, 477 U.S. at 139; *South-Central Timber*, 467 U.S. at 91; *Sporhase*, 458 U.S. 941. This Court, in *South-Central Timber*, has further stated that the need for "affirmative approval" of the state statute or regulation is "heightened" when the statute has "substantial ramifications beyond the Nation's borders." 467 U.S. at 92 n.7.[22]

In fact, the "burden [is on the state to] demonstrat[e] a clear and unambiguous intent on behalf of Congress to permit the discrimination against interstate [and foreign] commerce . . . ." *Wyoming v. Oklahoma*, 112 S. Ct. at 802.

This Court has held that such intent was not demonstrated by reservation to the states of the regulation of local utility rates in the Federal Power Act (*Wyoming v. Oklahoma*), consistency of the state regulation with federal legislation (*South-Central Timber*), deferral by Congress to state law in thirty seven statutes (*Sporhase*), or approval by Congress of several interstate water compacts (*id.*). The congressional enactment must be "an affirmative grant of power to the states to burden . . . commerce 'in a manner which would otherwise not be permissible.' *Southern Pacific Co. v. Arizona ex rel. Sullivan*, [325 U.S. 761,] 769." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982). These cases presuppose some federal enactment which demonstrates such affirmation. Here there is no such enactment.

The California Supreme Court's approach eliminates the threshold inquiry of burden on commerce and the evidentiary burden on the state to show the "clear and unambiguous intent" of Congress to permit a violation of the Commerce Clause. Rather, the California court would assume a tax valid unless Congress says "no."

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[22]The reason that "congressional authorization not be lightly implied" is the need for a consistent and coherent foreign policy which is the exclusive responsibility of the federal government. *South-Central Timber*, 467 U.S. at 92 n.7.

The decision below cannot be reconciled with the decisions of this Court on removal of state action from Commerce Clause scrutiny. The decision is an invitation to state taxation unrestrained by constitutional limitations.

2. THE DECISIONS BELOW UNDERMINE ESSENTIAL CONSTITUTIONAL RESTRAINTS ON STATE POWER TO INTERFERE IN THE CONDUCT OF FOREIGN POLICY, AND, IF LEFT UNDISTURBED, THREATEN SERIOUS HARM TO THE NATION.

The decisions below have implications far beyond the question of constitutionality of worldwide combined reporting as applied herein. The California court proceeds on the assumption that *Wardair* presages a diminution in the reach of the dormant foreign Commerce Clause.[23] Although it recognized that foreign governments objected strenuously to the practice of worldwide combined reporting and that "executive branch officials charged with conducting American foreign commercial policy agree[d] with them," App. C at 37 n.21, the California court used the alleged diminution as its predicate for ignoring both the United States and the foreign governments. Given the importance of foreign Commerce Clause jurisprudence, which concerns "sensitive matters of foreign relations and national sovereignty," *Japan Line*, 441 U.S. at 456, this Court should clarify that there is no such diminution.

The California court's substitute test, if left to stand, would lead to serious harm to the Nation. A recurring theme in this Court's decisions on foreign commerce issues is concern over harm to the nation as a whole from state actions which may lead to retaliation. *Japan Line*, 441 U.S. 434; *Container*, 463 U.S. 159; *Kraft*, 112 S. Ct. 2365; *Chy Lung v. Freeman*, 92 U.S. 275 (1875). These decisions recognize that all nations have a proper concern for the well being of their nationals, that nations do not take these concerns lightly, that response is a national, not a state, responsibility and that states have no role in the process. *Hines v.*

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[23]The California court refers to this Court's "recent foreign Commerce Clause jurisprudence" but relies only upon *Wardair*.

Davidowitz, 312 U.S. 52 (1941); *Zschernig v. Miller*, 389 U.S. 429 (1968); *Japan Line*, 441 U.S. 434.

The decision below, however, trivializes nation-to-nation initiatives to resolve conflicts, including such efforts as those in this case to have the states voluntarily cease use of the apportionment method.[24] Patience by nations is viewed by the California court as evidence of congressional acquiescence. If any test is destined to lead to retaliation by foreign governments, it is the California court's new test.

The "one voice" test proceeds from the strong presumption of the need for federal uniformity in the area of foreign commerce. *Japan Line*, 441 U.S. 434; *Wardair*, 477 U.S. 1. The decision of the court below sees no need for uniformity. Rather it invites state interference in foreign affairs unless Congress curbs the state. The California court would silence the Executive[25] and in the silence of Congress permit a cacophony of state voices. Who can tell our foreign trading partners what the policy of the United States is? Can our foreign trading partners rely upon the responses of the Executive? Is this not exactly the situation which will lead to retaliation and harm to the nation as whole?

The issue is even more serious since it is the United States that has been the leader in establishing the international standard. The standard forwards the long established and overarching United States foreign economic policy to open markets and remove barriers to trade. The standard provides a framework for management of conflict and mitigation of double taxation. United States

[24]The California court calls the results of such efforts "meliorative measures designed to pacify critics," App. C at 36, a clear invitation to the states to revoke such "measures" when they tire of "pacification."

[25]The Federal Executive has substantial power in the area of foreign affairs. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *United States v. Pink*, 315 U.S. 203 (1942); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In the absence of congressional action, executive action, particularly, as here, against a backdrop of enacted national policy designed specifically to deal with international division of income, is entitled to great weight. *Youngstown Sheet*, 343 U.S. 579; *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

business benefits from this standardization. Other nations will not long tolerate increased taxes on their nationals from California's aberrant system, increased burdens of compliance arising from the requirement that their nationals respond to two separate systems to divide and report their international income among competing jurisdictions, and possible impact on their fiscs, without retaliating against American business.[26]

If a state of the United States which is economically the equivalent to the seventh or eighth largest nation in the world is permitted to promote its incompatible and inconsistent tax system, how can the United States seek the cooperation of its trading partners in adhering to the international standard? This Court's review is essential to prevent further erosion of these important federal policies.

3. THE CALIFORNIA COURT'S DETERMINATION THAT THE ADDITIONAL COMPLIANCE BURDENS FOR FOREIGN TAXPAYERS UNDER THE CALIFORNIA TAX SYSTEM DO NOT CONSTITUTE UNCONSTITUTIONAL DISCRIMINATION IS NOT RECONCILABLE WITH THIS COURT'S DECISIONS.

The problems with worldwide combined reporting do not end with consideration of its intrusion into the world of international relations. On a practical level, worldwide combined reporting also discriminates against foreign multinational groups in how it operates: it leaves such groups with a Hobson's choice of incurring excessive cost to set up an accounting system solely to capture and maintain information to properly file a California tax return, or forego possible tax benefits, an anticompetitive choice domestic corporations do not have to face. App. A at 26. Domestic corporations already have this information generally available for United States tax and financial accounting purposes and regularly collect such information in the normal course of business. Domestic corporations doing business abroad do not have to create a second and separate system to report their worldwide operations to the host country—since all nations, including the United

[26]The United Kingdom already has.

States, observe the international practice, and do not require inquiry beyond the operations of the entity in that country to file a tax return. Foreign multinational groups, however, have to create an additional and special system solely for purposes of complying with California's tax system. The cost to create and maintain such a system is significant.

The California Court of Appeal in its first opinion characterized compliance with worldwide combined reporting as an "administrative nightmare" for foreign based taxpayers.[27] App. B at 25. The court twice agreed that the costs of compliance with California's system were both significant and greater for foreign businesses than domestic businesses. App. B at 25, App. D at 9-10. Nevertheless, that court determined that such burdens were nondiscriminatory since California asked for the same information from and applied the same tax rate to all taxpayers.[28]

This exact kind of reasoning has been rejected by this Court several times. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232 (1987); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). A state's power may not be used with the aim *or the effect* of establishing economic barriers against competition; i.e. it may not protect local commerce by placing a burden on competing out-of-state commerce. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). Overt favoritism of local interests is not an essential element of discrimination, especially in the foreign arena. *Kraft*, 112 S. Ct. 2370; *Japan Line*, 441 U.S. at 434. In *Hunt*, this Court held that a North Carolina provision barring all grades, other than USDA, on sales of apples in closed containers had the *practical* effect not

[27] The trial judge who heard the evidence describes in greater detail some of the problems. App. A at 26-28.

[28] Respondent adopted Regulation 25137-6 (App. J), which sets forth detailed provisions for proper filing of returns for multinational businesses. No foreign owned business can comply with the Regulation without either inordinate cost or the use of a relief provision solely within respondent's discretion. Regulation 25137-6 does not apply to interstate business.

only of burdening interstate sales of Washington apples, but also of discriminating against them. The discriminatory provision raised the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected. The Washington growers had to scrap their system and institute new procedures for a state which represented less than 2% of their market. This Court pointed out: "the increased costs imposed by the statute would tend to shield the local apple industry from the competition of Washington apple growers and dealers who are already at a competitive disadvantage because of their great distance from the North Carolina market." 432 U.S. at 351. The new grading system also deprived the Washington growers of the benefits from their own recognized and accepted grading system.

In this case, the additional compliance burdens clearly raise the cost of doing business in the California market for foreign multinationals compared to their domestic competitors. Domestic businesses already have in place a compatible system for business done in the United States and domestic multinational business does not incur the incremental cost of responding to an entirely different set of worldwide information requirements when doing business in a foreign nation.

Moreover, California's aberrant system, with its different information requirements, has the effect of stripping away from foreign business the economic advantages of the limited reporting requirements under the international standard. United States multinational business retains the protection of the international standard when it goes abroad since no nation requires worldwide group information converted to that nation's tax accounting rules with the practical concomitant creation of a new worldwide system to capture such information. Further, the burden is exacerbated because a foreign multinational business tends to have more of its business outside the United States (in petitioner's case over 98%), whereas a United States multinational business will generally have a substantial portion of its business in the United States (with United States tax information readily convertible into California information). *Compare Hunt*, 432 U.S. 333; *Japan Line*, 441 U.S. 434. That the degree of discrimination may

vary vis-a-vis a domestic competitor is not significant. Once discrimination is established, the degree is inmmaterial. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 759 (1981); *New Energy Co. v. Limbach*, 486 U.S. 269, 274-76 (1988).

Petitioner does not rely on cost alone although this Court has recognized that cost, taken into consideration with other factors, is a relevant inquiry in determining burdens on commerce. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). For example, in *Pike v. Bruce Church, Inc.*, 397 U.S. at 145, the construction of a packing operation in Arizona at a cost of $200,000 was significant in determining unconstitutional discrimination.[29] *See also Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978) (state regulation on length of trucks imposed substantial cost on movement of goods interstate); *Toomer v. Witsell*, 334 U.S. 385, 404-04 (1948) (cost of packaging and stamping shrimp in the state). Here, the California system also forces foreign multinational businesses into the choice of setting up a costly compliance system or foregoing tax benefits.[30]

Worldwide combined reporting is a modern prototype of the "drummer" cases, where state taxes or other requirements placed out-of-state taxpayers at a commercial disadvantage.[31] Asking for the same information when one party does not have the information is not any more even-handed than requiring all apple growers in North Carolina to use the same system. And, in practice,

[29]The Superior Court found in this case that the cost to reconstruct, set up and maintain a system was "huge, over $5,000,000.00 to establish and over $2,000,000.00 annually to maintain. Such amounts are conceded by FTB to be unreasonable if true; but they are claimed unnecessary for proper compliance. I find them so necessary." App. A at 27-28.

[30]As this Court found in *New Energy Co.*, 486 U.S. 269, unconstitutional commercial disadvantage can arise from denial of tax benefits.

[31]Drummers were travelling salesmen. Localities concocted license and other schemes which in practice only applied to the out-of-stater. *See Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1887); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940); *Nippert v. City of Richmond*, 327 U.S. 416 (1946). *See also American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987).

foreign taxpayers do not pay at the same effective rate where, lacking the proper information in the proper form, they file on a different—and generally higher—tax base.

The California court's decision cannot be reconciled with this Court's decision on discrimination under the Commerce Clause.

4. CALIFORNIA'S FILING REGULATION VIOLATES DUE PROCESS AS FOREIGN MULTINATIONALS MUST FILE UNDER A STANDARDLESS RELIEF PROVISION AND NEGOTIATE THEIR TAX LIABILITY TO AVOID BURDENSOME COSTS OF COMPLIANCE.

This Court's decisions require that a statute or regulation contain sufficiently explicit standards, not only for a person of ordinary intelligence to understand what conduct is prohibited, but also to prevent arbitrary, harsh and discriminatory enforcement by government officials. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1971); *Kolender v. Lawson*, 461 U.S. 352, 360 (1982); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 168-69 (1972).

A foreign taxpayer cannot file a California combined return in accordance with the mandated provisions of Regulation 25137-6 without inordinate cost. Such a taxpayer must rely on the discretion of respondent under subdivision (e) of that Regulation (App. J at 8) to accept something in lieu thereof. The Court of Appeal determined when respondent must accept "reasonable approximations" of required data (when it is too costly), but not what respondent must accept. Where as here a taxpayer negotiates the "what" under threat of penalty[32] the result is a non-uniform set of compliance rules. A non-uniform rule encourages arbitrary and discriminatory enforcement. *Southern Coop. Dev. Fund v. Drig-*

[32]Respondent threatened penalties for failure to produce detailed—and confidential—information from at least one other foreign taxpayer. See *EMI Ltd. v. Bennett*, 560 F. Supp. 134 (N.D. Cal. 1982), *aff'd*, 738 F.2d 994 (9th Cir. 1981); *Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1110-11 (9th Cir.), *cert. denied*, 455 U.S. 943 (1982).

gers, 696 F.2d 1347 (11th Cir.), *cert. denied,* 463 U.S. 1208 (1983).

Judicial review cannot cure an enactment when the standard of enforcement is not explicit or when enforcement rests in the effectively standardless discretion of the administering agency. *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676, 685 (1968); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). Moreover, negotiating their tax returns means that foreign taxpayers in essence file on a different tax base than others, resulting in equally unconstitutional discrimination.

A system without predictable consistency cannot be reconciled with this Court's requirements under the Due Process Clause.

CONCLUSION

This Court has established a framework for analysis of burdens under the foreign Commerce Clause. The California court has not only jettisoned the analytical framework created by this Court in *Japan Line* and *Container,* it has essentially embraced an approach which this Court has rejected many times, namely that the states are free to tax until Congress tells them to stop. *See, e.g., Japan Line,* 441 U.S. at 454-55; *Southern Pac. Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761, 769 (1945). The decisions below cannot be reconciled to the principles established by this Court and carry grave dangers of harm to the Nation. For the foregoing reasons this Court should grant this petition for Writ of Certiorari.

Respectfully submitted,

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